



The University of the State of New York

The State Education Department

State Review Officer

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No. 11-111

Application of a STUDENT WITH A DISABILITY, by his parent, for review of a determination of a hearing officer relating to the provision of educational services by the Board of Education of the [REDACTED] School District

Appearances:

Hodgson Russ LLP, attorneys for respondent, Ryan Everhart, Esq., of counsel

DECISION

Petitioner (the parent) appeals from a decision of an impartial hearing officer which determined that the educational program respondent's (the district's) Committee on Special Education (CSE) had recommended for her son for the 2010-11 school year was appropriate and which denied the parent's request for an independent educational evaluation (IEE) to assess the student's need for assistive technology. The appeal must be dismissed.

Background

At the time of the impartial hearing, the student was attending eighth grade at the district's middle school. The student's eligibility for special education and related services as a student with deafness is not in dispute in this appeal (see 34 C.F.R. § 300.8[c][3]; 8 NYCRR 200.1[zz][2]).

The student's educational programs have been the subject of previous administrative appeals (see Application of a Student with a Disability, Appeal No. 09-091; Application of a Student with a Disability, Appeal No. 09-003; Application of a Student with a Disability, Appeal No. 08-077; Application of the Bd. of Educ., Appeal No. 07-087); therefore, the parties' familiarity with the student's prior educational history is presumed and will not be repeated here in detail. However, some background information relevant to this appeal is set forth below.

On April 27, 2010, the district and the parents entered into an agreement to settle and withdraw the claims raised in the parent's January 31, 2010 due process complaint notice challenging the student's individualized education program (IEP) for the 2009-10 school year (Dist. Ex. 1). In the April 2010 settlement agreement, the parties agreed to certain services and instruction for the student, and specified goals that would be "in effect through October 2010," among other things (id. at pp. 1-5). According to the agreement, the district would conduct a psychological evaluation and an assistive technology evaluation would be conducted through the local Board of Cooperative Educational Services (BOCES) (id.). In addition, the settlement agreement noted that the parents would make the student available for the evaluations, and it set forth a time frame for completion of the evaluations and for the CSE to meet to review the results (id. at pp. 1, 4).¹ A June 4, 2010 CSE meeting was scheduled to amend the student's IEP in accordance with the agreement (id. at pp. 1, 4).² The agreement stated that the assistive technology evaluation would be completed during September 2010 and a second CSE meeting would be scheduled during the first two weeks of October 2010 to review the results of the assistive technology evaluation (id. at p. 4). According to the agreement, the goals therein would be in effect until the CSE reconvened in October 2010, when goals would be written for the rest of the 2010-11 school year (id. at p. 4).

The CSE convened on July 15, 2010, and student's IEP for the 2010-11 school year was developed (Dist. Exs. 15; 16). Although the district had arranged for BOCES to conduct an assistive technology evaluation of the student, a waiting list was in effect for the evaluation and it was to begin in September; BOCES sent out a questionnaire to be completed by the district and the parent before the assistive technology evaluation was to be conducted (Tr. pp. 64-66).³ In a letter dated September 13, 2010, the district's director of special education initially sent the questionnaire to the parents and indicated that "[a]s part of the evaluation, BOCES would like the enclosed parent information packet to be completed" and that "[o]nce this is handed in, BOCES will then come to the district to complete the evaluation" (Dist. Ex. 21). Two additional letters were sent to the parents by the director of special education on September 29, 2010 and October 8, 2010, again requesting that the information packet be completed (Dist. Exs. 26; 27). In a letter to the director of special education dated October 19, 2010, the student's mother asserted, among other things, that the district was not in compliance with the settlement agreement because it had not completed the assistive technology evaluation or conducted a CSE meeting to review the student's program and develop new goals (Dist. Ex. 28). The student's mother also raised certain objections and questions regarding the parent information form (id.). In a letter dated October 25, 2010 to the parent, the director of special education requested that the parent call the special education office regarding her questions and further advised that the assistive technology evaluation would begin in November 2010 (Dist. Ex. 30). On December 8, 2010, evaluators from BOCES came to the district's school to conduct the assistive technology

¹ The parties agreed that the psychological evaluation would be completed at least 10 days before the scheduled June 4, 2010 CSE meeting (Dist. Ex. 1 at p. 4). On May 21, 2010, a psychoeducational evaluation of the student was conducted by the district school psychologist (Dist. Ex. 63).

² This meeting was rescheduled to June 24, 2010 because the hearing specialist could not attend (Dist. Exs. 5; 6). Thereafter, the June 24, 2010 CSE meeting was "tabled" and the CSE reconvened on July 15, 2010 (see Dist. Exs. 10-12; 15; 16).

³ The district completed the questionnaire on September 24, 2010 (Dist. Ex. 23).

evaluation with the student, but the student advised the evaluators that his mother had told him not to participate (Dist. Exs. 37; 39; 40).

Due Process Complaint Notice

In a due process complaint notice dated January 7, 2011, the parent generally asserted that an impartial hearing was requested to address her disagreement with the CSE's recommendations for the 2010-11 school year,⁴ the district's "failure to implement," evaluations, and provision of a free appropriate public education (FAPE) to her son (IHO Ex. 1 at p. 2). The parent also asserted that parts of the April 27, 2010 settlement agreement between the parties had not been implemented by the district (id.). The parent specifically asserted that the district did not complete an assistive technology evaluation by September 2010, and that a CSE meeting was not scheduled during October 2010 to review the results of the evaluation, as required by the settlement agreement (id.). In addition, the parent asserted that the student's IEP for the 2010-11 school year was inappropriate, thereby denying the student a FAPE (id.). The parent specifically alleged that the student's IEP did not contain measurable annual goals, that the student's annual goals included in the July 2010 IEP "expired" in October 2010, and that the IEP did not specify appropriate assistive technology or amount of resource room time that the student was being provided (id.). In addition, the parent generally asserted disagreement with "the present levels of performance, needs, and abilities, program modifications/accommodations/supplementary aids and services, support for school personnel, and recommended special education programs and services" (id. at pp. 2-3). As relief, the parent requested an "admission" by the district that the student was denied a FAPE; that the CSE reconvene to develop an appropriate IEP for the 2010-11 school year with a different CSE chairperson; and an independent assistive technology evaluation at public expense (id. at p. 3).

Impartial Hearing Officer Decision

An impartial hearing convened on May 26, 2011, and concluded after one day of testimony (Tr. pp. 1-146). In a decision dated August 2, 2011 the impartial hearing officer found that that the district was not able to conduct the assistive technology evaluation because of the parent's lack of cooperation, as evidenced by her failure to complete the BOCES "parent questionnaire" (IHO Decision at pp. 6-7). In addition, the impartial hearing officer found that the parent failed to respond to the district's repeated attempts to obtain her cooperation regarding the questionnaire (id. at p. 7). Specifically, the impartial hearing officer found that when attempts were made to move forward with the evaluation without the completed parent questionnaire, the parent withdrew her consent for the evaluation and instructed the student not to participate in the evaluation (id.). Based upon these facts, the impartial hearing officer concluded that the parent's actions were "more than unreasonable" (id. at p. 7). He further concluded that the parent "deliberately frustrate[d] the process" (id.). Additionally, the impartial hearing officer found that the district's failure to initiate an impartial hearing regarding the parent's request for an IEE was "excused" in this case because the district could not defend an evaluation that it could not conduct due to the parent's "intransigence" (id.). Therefore, he denied the parent's request for an IEE (id.).

⁴ The parent did not specify the date of the CSE meeting or IEP she was challenging in her January 2011 due process complaint notice, although it is clear from the context of the hearing record that the July 15, 2010 IEP is at issue (see IHO Ex. 1; Pet. ¶¶ 10, 39, 43).

Regarding the parent's allegation that the student was denied a FAPE for the 2010-11 school year, the impartial hearing officer found that while it "appear[ed] that the academic goals should have be[en] updated," the district did not deny the student a FAPE, noting that "but for the parent's intransience, the [assistive technology evaluation] would have be[en] completed and the CSE would have reconvened" to develop an IEP with updated goals (IHO Decision at p. 9). In addition, regarding the parent's assertion that she disagreed with the present levels of performance, needs, abilities, program modifications, accommodations, supplementary aids and services, assistive technology, support for school personnel, and recommended special education programs and services, the impartial hearing officer found that such "appear[ed] to be nothing more than a 'kitchen sink' assault of the IEP" and that the hearing record did not support a finding that the student was denied a FAPE based on these allegations (*id.*). The impartial hearing officer denied the parents' claims and dismissed the parent's due process complaint notice (*id.*).

Appeal for State-level Review

The parent appeals and in her petition asserts that the impartial hearing officer erred in referring to her due process complaint notice as dated January 2010 because the complaint in the instant case was dated January 2011, and the impartial hearing officer did not have jurisdiction to dismiss the January 2010 due process complaint notice that had been previously filed by the parent and resulted in the April 27, 2010 settlement agreement.⁵ The parent further asserts, among other things, that the impartial hearing officer erred in finding that she did not respond to the district's letters concerning the assistive technology evaluation; that the parent's response to the questionnaire was required in order to conduct the assistive technology evaluation; and that the delay in conducting the assistive technology evaluation was the parent's fault. In addition, the parent asserts that the impartial hearing officer erred by failing to find that the district did not comply with the terms of the settlement agreement, and further erred in finding that the parent was not cooperative with the assistive technology process. The parent also asserts that the goals contained in the student's July 15, 2010 IEP were not current, "expired" in October 2010, were not measurable, and that progress reports were not provided to the parent. The parent asserts that the impartial hearing officer erred when he concluded that the student received a FAPE because his IEP did not have any current measurable goals on his IEP; the CSE did not reconvene to recommend current present levels of performance; and the IEP did not indicate the recommendations of the CSE and placement of the student in resource room, and how progress was to be reported to the parents per the settlement agreement. In addition, the parent asserts that the impartial hearing officer erred when he did not address other issues identified by the parent in her due process complaint.

The parent also alleges that the impartial hearing officer held a prehearing conference, but failed to clarify the issues. The parent further asserts that the impartial hearing officer erred when he did not make a determination concerning an alleged violation of the parental due process rights when the district released educational records to BOCES. In addition, the parent

⁵ Upon review of the hearing record, I find that the reference by the impartial hearing officer to the January 2010 due process complaint notice appears to constitute a typographical error and that elsewhere in the decision, he correctly referred to the date of the complaint at issue as January 2011 (IHO Decision at pp. 3, 5, 9).

asserts that the district failed to implement the student's pendency (stay put) placement and that the impartial hearing officer erred in dismissing her claims.

As relief, the parent seeks a determination that the student is not currently receiving the agreed upon pendency placement and that such placement be ordered and/or compensatory and or "day for day corrective action services" for the period of time that the student was denied a FAPE. In addition, the parent requests that the impartial hearing officer's August 2011 decision be annulled in its entirety. The parent seeks findings that the student's 2010-11 IEP was not reasonably calculated to meet the individual needs of the student; that the district did not implement legally required procedures; that the district denied the student a FAPE during the 2010-11 school year; and that the district violated the parent's due process rights by releasing educational records to BOCES without prior written consent or prior written notice to the parent. The parent seeks an order directing that an independent assistive technology evaluation be provided at public expense and that the CSE reconvene to create an appropriate IEP for the 2011-12 school year to determine if the student needs additional services to make up for the district's alleged failure to offer a FAPE for the 2010-11 school year. The parent attaches additional evidence to her petition.

In an answer, the district asserts general admissions and denials to the claims in the parent's petition. Specifically, the district asserts that the parent's claim regarding the student's pendency placement for the 2011-12 school year and introduction of additional evidence in support of the claim is improper as such was not raised in the due process complaint notice or addressed at the impartial hearing. In addition, the district asserts that the impartial hearing officer properly determined that the failure of the district to complete the assistive technology evaluation was due to the parent's conduct and not due to any improper action by the district, and that the district undertook reasonable and appropriate measures to complete the assistive technology evaluation before the proposed October 2010 CSE meeting. The district also asserts that there was no evidence in the hearing record to indicate that the student was harmed by the district's inability to complete the assistive technology evaluation. The district asserts that it properly exchanged information with BOCES regarding the student. However, the district further asserts that the impartial hearing officer did not have jurisdiction regarding this claim because student confidentiality claims under FERPA are not subject to due process proceedings. Regarding the parent's pendency claim, the district asserts that the issue concerns the 2011-12 school year and was not raised at the impartial hearing below.

Applicable Standards

Two purposes of the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove v. T.A., 129 S. Ct. 2484, 2491 [2009]; Bd. of Educ. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the

IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). While school districts are required to comply with all IDEA procedures, not all procedural errors render an IEP legally inadequate under the IDEA (A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if a procedural violation is alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 C.F.R. § 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; A.H. v. Dep't of Educ., 2010 WL 3242234, at *2 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007] aff'd, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

The IDEA directs that, in general, an impartial hearing officer's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 130 [2d Cir. 1998]; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 C.F.R. §§ 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

An appropriate educational program begins with an IEP that accurately reflects the results of evaluations to identify the student's needs (34 C.F.R. § 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; Tarlowe v. Dep't of Educ., 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008]), establishes annual goals related to those needs (34 C.F.R. § 300.320[a][2]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (34 C.F.R. § 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see Application of the Dep't of Educ., Appeal No.

07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9).

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at *7 [S.D.N.Y. Aug. 27, 2010]).

Discussion

Scope of Review

Before addressing the merits of this case, I will consider the parent's assertions that the impartial hearing officer erred by: (1) failing to decide whether the district implemented portions of the student's IEP; and (2) failing to decide whether the district violated the parent's due process rights by releasing the student's educational records to BOCES without prior written consent or notice.⁶ With respect to these contentions, a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its original due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 C.F.R. §§ 300.507[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]) or the original due process complaint is amended prior to the impartial hearing per permission given by the impartial hearing officer at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 C.F.R. § 300.507[d][3][ii]; 8 NYCRR 200.5[i][7][b]; see R.B. v. Dep't of Educ. of City of New York, 2011 WL 4375694, at *6-*7 [S.D.N.Y. Sept. 16, 2011]; M.P.G., 2010 WL 3398256, at *8; Snyder v. Montgomery County. Pub. Sch., 2009 WL 3246579, at *7 [D. Md. Sept. 29, 2009]; Saki v. Hawaii, 2008 WL 1912442, at *6-7 [D. Hawaii Apr. 30, 2008]; Application of the Dep't of Educ., Appeal No. 10-070; Application of a Student with a Disability, Appeal No. 09-140). Upon review of the parent's due process complaint notice, I find that it may be reasonably read to raise the IEP implementation issue; therefore, I will address this issue on appeal. However, the parent's due process complaint notice cannot be reasonably read to raise the issue of the district's release of the student's educational records to BOCES without prior written consent or notice (see IHO Ex. 1). Additionally, while the parent cross examined a district witness as to whether consent was obtained before the student's records were sent to BOCES (see Tr. pp. 101-103), and the hearing record contains a closing brief submitted by the parent relating to this issue, I find that the hearing record does not show that the district agreed to expand the scope of the impartial hearing to include this issue. I also note that the district's closing brief did not address this issue. Further, the hearing record does not reflect that the parent submitted, or that the impartial hearing officer authorized, an amendment of the parent's January 2011 due process complaint notice to include this issue.

⁶ As to the implementation claim, the parent asserts in her petition that the impartial hearing officer erred by not addressing the failure of the district to measure progress toward the student's IEP goals every 2 months, to supply the audiological services recommended by the CSE, to convene an academic team meeting to include the parent and student on a monthly basis, and to use a communication book for weekly communication (Pet. ¶ 43).

Where, as here, the parent did not seek the district's agreement to expand the scope of the impartial hearing to include this issues or file an amended due process complaint notice, I decline to review the issue. To hold otherwise inhibits the development of the hearing record for the impartial hearing officer's consideration, and renders the IDEA's statutory and regulatory provisions meaningless (see 20 U.S.C. § 1415[f][3][B]; 34 C.F.R. §§ 300.511[d], 300.508[d][3][i]; 8 NYCRR 200.5[j][1][ii]). "By requiring parties to raise all issues at the lowest administrative level, IDEA 'affords full exploration of technical educational issues, furthers development of a complete factual record and promotes judicial efficiency by giving these agencies the first opportunity to correct shortcomings in their educational programs for disabled children.'" (R.B., 2011 WL 4375694, at *6, quoting Hope v. Cortines, 872 F. Supp. 14, 19 [E.D.N.Y. 1995] and Hoelt v. Tucson Unified Sch. Dist., 967 F.2d 1298, 1303 [9th Cir.1992]; see C.D. and R.D v. Bedford Cent. Sch. Dist., 2011 U.S. Dist. LEXIS 107381, at *33 [S.D.N.Y. Sept. 22, 2011] [holding that a transportation issue was not properly preserved for review by the review officer because it was not raised in the party's due process complaint notice]).

I further note that the impartial hearing officer properly did not reach this issue and find that this contention is raised for the first time on appeal and is outside the scope of my review and therefore, I will not consider it (see M.P.G., 2010 WL 3398256, at *8; Snyder v. Montgomery County Pub. Sch., 2009 WL 3246579, at *7 [D. Md. Sept. 29, 2009]; see also Application of a Student with a Disability, Appeal No. 11-042; Application of a Student with a Disability, Appeal No. 11-041; Application of the Dep't of Educ., Appeal No. 11-035; Application of a Student with a Disability, Appeal No. 11-008; Application of a Student with a Disability, Appeal No. 11-002; Application of a Student with a Disability, Appeal No. 10-105; Application of a Student with a Disability, Appeal No. 10-074; Application of a Student with a Disability, Appeal No. 09-112).

Next, with regard to the parent's assertion that the student is not currently receiving the agreed upon pendency placement,⁷ the parent asserts that during the impartial hearing, the student remained in the agreed upon pendency placement pursuant to the April 27, 2010 settlement agreement. Although lacking clarity, the parent's assertion on appeal is apparently based upon the claim that the student's IEP—the one currently in dispute—was not amended to reflect an agreement to add another period of resource room services. However, it is unclear from her petition the extent to which she is alleging that there was a deprivation of services pursuant to pendency or that the student's IEP did not reflect an informal agreement reached by

⁷ The parent attaches additional evidence to her petition in support of her pendency claim. Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an impartial hearing officer's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of the Bd. of Educ., Appeal No. 10-111; Application of a Student with a Disability, Appeal No. 10-062; Application of the Dep't of Educ., Appeal No. 10-047; Application of a Student with a Disability, Appeal No. 10-002; Application of a Student with a Disability, Appeal No. 09-104; Application of a Student with a Disability, Appeal No. 09-073; Application of a Student with a Disability, Appeal No. 08-030; Application of the Dep't of Educ., Appeal No. 08-024; Application of a Student with a Disability, Appeal No. 08-003; Application of the Bd. of Educ., Appeal No. 06-044; Application of the Bd. of Educ., Appeal No. 06-040; Application of a Child with a Disability, Appeal No. 05-080; Application of a Child with a Disability, Appeal No. 05-068; Application of the Bd. of Educ., Appeal No. 04-068). In this case, the additional evidence is not necessary in order to render a decision in this case. I therefore decline to accept the proffered evidence.

the parties (Pet. ¶¶ 45-49). Insofar as this issue remains unclear; has not been the subject of a due process hearing during which the district would have an opportunity to respond to any claims regarding pendency; and no impartial hearing officer has had an opportunity to hear the issue, allow for the development of a hearing record and rule accordingly, the parent's pendency claim will not be considered for the first time on appeal (see M.P.G., 2010 WL 3398256, at *8; Snyder v. Montgomery County Pub. Sch., 2009 WL 3246579, at *7 [D. Md. Sept. 29, 2009]).⁸

Jurisdiction

Next I will consider whether the impartial hearing officer had jurisdiction to enforce the parties' prior settlement agreement. State regulations provide that settlement agreements "shall be enforceable in any State court of competent jurisdiction or in a district court of the United States" (8 NYCRR 200.5[j][2][iv]). Accordingly, the regulations do not confer jurisdiction to enforce settlement agreements at an impartial hearing or on appeal to a State Review Officer and the parent's claims that the district failed to implement the parties' settlement agreement will not be considered (see Application of the Bd. of Educ., Appeal No. 07-043). While a settlement agreement may, in some instances, be admissible and relevant to the facts underlying a parties' dispute in a due process proceeding, the administrative hearing officers in due process proceedings in New York lack enforcement mechanisms of their own and the Second Circuit has held that due process is not the appropriate procedure for enforcing the provisions of a settlement agreement (H.C. v. Colton-Pierrepont Cent. Sch. Dist., 2009 WL 2144016 [2d Cir. 2009]). Accordingly, I will only address the parties' dispute insofar as it relates to the requirements of the IDEA and the New York Education Law.

July 2010 IEP

Evaluative Data and Present Levels of Performance

The parent asserts that among other things, she disagrees with the present levels of performance reflected in the student's July 2010 IEP. Among the elements of an IEP is a statement of a student's academic achievement and functional performance and how the student's disability affects his or her progress in relation to the general education curriculum (20 U.S.C. § 1414[d][1][A][i][I]; 34 C.F.R. § 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; see 8 NYCRR 200.1[ww][3][i]). In developing the recommendations for a student's IEP, the CSE must consider the results of the initial or most recent evaluation; the student's strengths; the concerns of the parents for enhancing the education of their child; the academic, developmental and functional needs of the student, including, as appropriate, the student's performance on any general State or district-wide assessments as well as any special factors as set forth in federal and State regulations (34 C.F.R. § 300.324[a]; 8 NYCRR 200.4[d][2]).

Initially, I note that the student's mother, the student, and parent advocate participated in the July 2010 CSE meeting and did not object to the evaluative data and present levels of performance (Dist. Exs. 16 at pp. 8; 77). Other meeting participants included the district's CSE chairperson, school psychologist, special education teacher, general education teacher, speech-

⁸ The parent is not left without recourse if she believes there has been a deprivation of pendency services. The parent would not be precluded by this decision from pursuing a separate due process complaint notice regarding the issue of the student's pendency placement during this proceeding.

language therapist, occupational therapist, hearing specialist, and recording secretary (*id.* at p. 8). Moreover, upon review, the hearing record reveals that the following were considered by the July 2010 CSE in development of the student's IEP: verbal reports and suggestions of participants at the July 2010 CSE meeting; an April 2010 speech-language evaluation report; the April 2010 settlement agreement; a February 2010 hearing evaluation report; a May 2010 psychoeducational evaluation report; and a December 2009 OT evaluation report (Dist. Ex. 16 at pp. 4-8; *see* Dist. Ex. 3).

The present levels of academic achievement, functional performance, and learning characteristics portion of the resultant July 2010 IEP included lengthy comments from each of the student's teachers and related services providers that consistently described the student as a capable, bright, and enthusiastic participant in class who asked appropriate questions to clarify his understanding; as well as a student who demonstrated difficulty with organization, consistent completion of homework, attendance, auditory memory, and auditory discrimination (Dist. Ex. 16 at pp. 4-6). The July 2010 CSE identified the student's academic needs as improvement in auditory discrimination, improvement in auditory recall skills, improvement in reading comprehension through reading aloud or listening and answering "wh" questions, development and implementation of a method of organization, and development of ASL sign language skills (*id.* at p. 6). In the area of social development, the CSE determined that the student's social skills were age appropriate and not affected by his disability (*id.* at p. 7). The July 2010 IEP further noted that concerning the student's physical development, his skills in physical education were age appropriate; and that when writing, the student consistently positioned his paper in midline or tilted to the right, demonstrated appropriate sitting posture, and his handwriting was legible in both manuscript and cursive (*id.*).⁹ According to the IEP, the student received OT services to assist him with use of a graphic organizer software program and due to his bilateral hearing loss, he required hearing aides and use of an FM system in the classroom (*id.*). The physical development portion of the July 2010 IEP also described results from the student's December 2009 OT evaluation regarding the student's range of motion, tone, reflexes, posture, strength, and sensory integration skills (*id.*). The student's physical development needs included learning to use the "Inspiration" program or another program independently to complete written work, hearing aids, and an FM system in all classrooms where instruction occurs, except physical education (*id.* at p. 8).

To address the student's identified needs, the July 2010 CSE developed annual goals and recommended he receive daily resource room services in a group of 5:1, individual hearing services two times weekly, individual OT two times monthly, and individual speech-language therapy one time weekly (Dist. Ex. 16 at p. 1). The CSE also recommended the following program modifications, accommodations, and supplementary aids and services: preferential seating, provision of notes, organizational aids, an exemption from summer reading, oral directions provided in written format, a communication book to provide the parent with pertinent information, a typed copy of homework assignments, and access to books on CD or MP3 player for independent reading in English (*id.* at p. 2). The July 2010 CSE also recommended assistive technology for the student including use of an amplification device (FM system) in all academic classes, use of Inspiration 9 or a similar program, access to a word processor, and hearing aids

⁹ The July 2010 IEP noted that the student was working on OT goals from his 2004-05 IEP due to "pendency" (Dist. Ex. 16 at p. 7).

(id. at pp. 2-3). The CSE further recommended a monthly hearing resource consult to meet with the student's academic team, related service providers, parent, and the student, as well as audiological services to test and calibrate the school-owned FM system (id. at p. 3). Lastly, the July 2010 CSE recommended testing accommodations for the student consisting of extended time (1.5), an alternate location, and written instructions provided with oral directions (id.).

Although the parent asserts that she disagrees with the present levels of performance, needs, and abilities; program modifications/accommodations/supplementary aids and services; assistive technology; support for school personnel; and recommended special education programs and services in the student's July 2010 IEP, I note that she does not allege that the information contained in the evaluation reports reviewed by the CSE was in any way inaccurate. Moreover, she has not further specified what specifically she "disagrees" with. As described below, the hearing record demonstrates that the CSE properly considered the evaluative data before it, developed an IEP for the student that accurately described his functioning in all areas, and recommended a program and services aligned with the student's needs that were designed to confer educational benefits to the student.

As noted previously, in developing the student's IEP, the July 2010 CSE relied on verbal reports and results from up-to-date evaluations (Dist. Ex. 16 at pp. 4-8; see Dist. Ex. 3). A complete diagnostic hearing evaluation of the student conducted in February 2010 revealed a mild sensorineural hearing loss in his right ear and a moderate sensorineural hearing loss in his left ear, which subsequently led to the student being fitted with behind the ear hearing aids in March 2010 (Dist. Ex. 65 at p. 1). The audiologist further recommended that the CSE meet to change the student's classification to a student with "deafness" or "hearing impairment" as well to provide additional services including speech, language, and auditory training; preferential seating in the classroom; a note taker; resource room; and the use of an FM system compatible with the student's hearing aids (id.).

Results from administration of standardized tests to the student between March and May 2010 revealed overall cognitive abilities in the average range, overall average mathematical abilities, a moderate receptive language disorder, and a mild written expressive language disorder (Dist. Exs. 63 at pp. 4-7; 67 at pp. 2-8).^{10, 11} The student's specific areas of receptive language difficulty were found to be in auditory discrimination; auditory recall of numbers, words, and sentences of increasing length; listening comprehension; and reading comprehension (Dist. Ex. 67 at pp. 2-5). He exhibited age appropriate spoken language skills in all areas as well as the ability to produce meaningful and syntactically correct written sentences; however, he demonstrated difficulty utilizing, recognizing and editing correct punctuation, capitalization, spelling, and word usage (id. at pp. 5-8). The student exhibited strong skills in phonological awareness of spelling rules and patterns, but difficulty spelling complex words requiring

¹⁰ Standardized tests administered between March and May 2010 included the Wechsler Intelligence Scale for Children—Fourth Edition, the KeyMath—3 Diagnostic Assessment, the Clinical Evaluation of Language Fundamentals—4th Edition, select subtests of the Test of Auditory Perceptual Skills—Upper Level, the Gray Oral Reading Tests—Fourth Edition, the Spadafore Diagnostic Reading Test, the Woodcock Johnson Language Proficiency Battery—Revised, and the Spelling Performance Evaluation for Language and Literacy (Dist. Exs. 63 at pp. 1, 3-7; 67 at pp. 2-8).

¹¹ The student achieved below average scores on two of the ten subtests of the KeyMath—3 Diagnostic Assessment (algebra, addition, and subtraction) (Dist. Ex. 63 at pp. 6-7).

morphological knowledge, semantic relationship knowledge, and creation of mental images of words (id. at p. 7).

A careful review of the hearing record shows that the student's July 2010 IEP contained descriptions of the student's deficits and needs as identified by the evaluators as well as concerns raised by the student and his parent during the CSE meeting (compare Dist. Ex. 16 at pp. 4-8, with Dist. Ex. 63 at pp. 4-7, and Dist. Exs. 64 at pp. 2-4; 65; 67 at pp. 4-8). The July 2010 IEP also incorporated numerous recommendations made by the evaluators to address the student's hearing loss and his deficits in auditory discrimination, auditory recall/listening comprehension, reading comprehension, and written expressive language (compare Dist. Ex. 16 at pp. 1-3, with Dist. Ex. 64 at pp. 3-4, and Dist. Exs. 65; 66; 67 at p. 9; 68).

Annual Goals

Turning to the parent's assertion that the annual goals were inappropriate, an IEP must include a written statement of measurable annual goals, including academic and functional goals designed to meet the student's needs that result from the student's disability to enable the student to be involved in and make progress in the general education curriculum; and meet each of the student's other educational needs that result from the student's disability (see 20 U.S.C. § 1414[d][1][A][i][II]; 34 C.F.R. § 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]). Each annual goal shall include the evaluative criteria, evaluation procedures and schedules to be used to measure progress toward meeting the annual goal during the period beginning with placement and ending with the next scheduled review by the committee (8 NYCRR 200.4[d][2][iii][b]; see 20 U.S.C. § 1414[d][1][A][i][III]; 34 C.F.R. § 300.320[a][3]).

As further discussed below, I find that the annual goals contained in the July 2010 IEP were sufficiently linked to the student's educational needs as described in the present levels of performance, and reflected the evaluative information available to the July 2010 CSE during the meeting. Annual goals developed for the student addressed his identified needs in organization, reading and listening comprehension, handwriting, sign language, and auditory recall; were sufficiently measureable; and included the evaluative criteria, evaluation procedures and schedules to be used to measure the student's progress (Dist. Ex. 16 at pp. 9-10). Although the parent contends that the student's annual goals "expired" in October 2010, and the hearing record reflects that the CSE intended to meet to review and update the goals (Tr. pp. 72, 78), I note that evidence shows that in November 2010, the student had only achieved one annual goal ("[g]iven instruction in ASL sign language, [the student] will learn the alphabet and ten functional conversational phrases") (Parent Ex. C8 at p. 13). The November 2010 progress report included an "[u]pdated [d]raft [g]oal[]" related to ASL sign language and also indicated that the student was progressing gradually in three goals, and progressing satisfactorily in one goal (id. at pp. 12-14). I note also that in February 2011, the student had achieved his updated goal related to ASL sign language, but was continuing to progress "gradually," "inconsistently," or "satisfactorily" toward other annual goals (Parent Ex. C9 at pp. 1-4).¹² Accordingly, upon review of the hearing record, I find that the student's annual goals continued to be appropriate to address his identified

¹² In January 2011, the student reportedly stated that "he was not to work on" his annual goal related to keeping track of assignments and due dates (Parent Ex. C9 at p. 4).

needs notwithstanding the parent's contention that they were inappropriate because they had "expired."

Implementation of the 2010-11 IEP

The parent further asserts that the district failed to implement certain portions of the July 2010 IEP. In order to show a denial of a FAPE based on a failure to implement an IEP, a party must establish more than a de minimus failure to implement all elements of the IEP, and instead must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP (Houston Independent School District v. Bobby R., 200 F.3d 341 at 349 [5th Cir. 2000]; see also Fisher v. Stafford Township Bd. of Educ., 2008 WL 3523992, at *3 [3d Cir. Aug. 14, 2008]; Couture v. Bd. of Educ. of Albuquerque Pub. Schs., 535 F.3d 1243 [10th Cir. 2008]; Neosho R-V Sch. Dist. v. Clark, 315 F.3d 1022, 1027 n.3 [8th Cir. 2003]). Accordingly, in reviewing failure to implement claims under the IDEA, courts have held that it must be ascertained whether the aspects of the IEP that were not followed were substantial, or in other words, "material" (A.P. v. Woodstock Bd. of Educ., 2010 WL 1049297 [2d Cir. March 23, 2010]; see Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811 [9th Cir. 2007] [holding that a material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled student and the services required by the student's IEP]; see also Catalan v. Dist. of Columbia, 478 F. Supp. 2d 73 (D.D.C. 2007) [holding that where a student missed a 'handful' of speech-language therapy sessions as a result of the therapist's absence or due to the student's fatigue, nevertheless, the student received consistent speech-language therapy in accordance with his IEP, and the district's failure to follow the IEP was excusable under the circumstances and did not amount to a failure to implement the student's program]).

Here, the hearing record does not reflect that material or substantial aspects of the student's 2010-11 IEP were not implemented, such that the student was denied a FAPE. Initially I note that the January 2011 due process complaint notice raises the implementation issue generally, and does not delineate any specific allegations (see IHO Ex. 1). Although the parent asserts in the petition that the district failed to measure progress toward the goals every 2 months, supply audiological services recommended by the CSE,¹³ convene an academic team meeting to include the parent and student on a monthly basis, and use a communication book for weekly communication (Pet. ¶ 43), I find insufficient evidence in the hearing record to support a finding that the district materially failed to implement the student's 2010-11 IEP. Notably, the parent does not allege that the student did not receive the special education program (resource room) and related services (hearing services, OT, and speech-language therapy) delineated on his July 2010 IEP, as well as numerous supports, including assistive technology devices, services and accommodations (see Dist. Ex. 16 at pp. 1-3). Accordingly there is no need to modify the impartial hearing officer decision with regard to the implementation of the student's July 2010 IEP.

¹³ I note that the parent does not specify in her petition what audiological services were allegedly not implemented. I further note, however, that the parent asserts in her closing brief at the impartial hearing that the district did not provide proof or testimony that the district tested and calibrated the school owned FM system two hours per semester (Parent's Closing Brief at p. 6).

IEE

I now turn to the parent's request for an independent assistive technology evaluation. Federal and State regulations provide that, subject to certain limitations, a parent has the right to an IEE at public expense if the parent disagrees with an evaluation obtained by the school district (34 C.F.R. § 300.502[a], [b]; 8 NYCRR 200.5[g][1]; see R.L. v. Plainville Bd. of Educ., 363 F. Supp. 2d 222, 234-35 [D. Conn. 2005] [finding parental failure to disagree with an evaluation obtained by a public agency defeated a parent's claim for an IEE at public expense]). A parent, however, is only entitled to one IEE at public expense "each time the public agency conducts an evaluation with which the parent disagrees" (34 C.F.R. § 300.502[b][5]; 8 NYCRR 200.5[g][1]; see R.L., 363 F. Supp. 2d at 234-35). If a parent requests an IEE at public expense, the school district must, without unnecessary delay, ensure that either an IEE is provided at public expense or initiate an impartial hearing to show that its evaluation is appropriate or that the evaluation obtained by the parent does not meet the school district criteria (34 C.F.R. § 300.502[b][2][i]-[ii];¹⁴ 8 NYCRR 200.5[g][1][iv]; see, e.g., A.S. v. Norwalk Bd. of Educ., 183 F. Supp. 2d 534, 549 [D. Conn. 2002] [upholding order of reimbursement where the district failed to demonstrate that its evaluation was appropriate]; Application of the Bd. of Educ., Appeal No. 09-109; Application of a Student with a Disability, Appeal No. 08-101). If a school district's evaluation is appropriate, a parent may not obtain an IEE at public expense (34 C.F.R. § 300.502[b][3]; 8 NYCRR 200.5[g][1][v]; DeMerchant v. Springfield Sch. Dist., 2007 WL 2572357, at *6 [D. Vt. Sept. 4, 2007]; Application of a Student with a Disability, Appeal No. 08-039; Application of a Child with a Disability, Appeal No. 07-126; Application of a Child with a Disability, Appeal No. 06-067; Application of the Bd. of Educ., Appeal No. 05-009; Application of a Child with a Disability, Appeal No. 04-082; Application of a Child with a Disability, Appeal No. 04-027).

First, upon review, I find that the hearing record does not indicate that the parent disagreed with an evaluation obtained by the school district as required by federal and State regulations that govern when a parent is entitled to an IEE at public expense (34 C.F.R. § 300.502[a], [b]; 8 NYCRR 200.5[g][1]; see R.L., 363 F. Supp. 2d at 234-35; Application of a Student with a Disability, Appeal No. 10-101; Application of a Student with a Disability, Appeal No. 10-033; Application of a Student with a Disability, Appeal No. 09-144).

Next, I find that the impartial hearing officer correctly concluded that the district had no obligation to initiate an impartial hearing regarding this matter because no district evaluation existed upon which to trigger this duty (see IHO Decision at p. 7; see also 34 C.F.R. § 300.502[b][2][i]; 8 NYCRR 200.5[g][1][iv]; R.L., 363 F. Supp. 2d at 235; Letter to Zirkel, 52 IDELR 77 [OSEP 2008]).

In addition, I find that the hearing record supports the impartial hearing officer's finding that the district was unable to conduct an assistive technology evaluation because of the parent's

¹⁴ The Analysis of Comments accompanying the federal regulations implementing the provisions for an IEE state that "[a]lthough it is appropriate for a public agency to establish reasonable cost containment criteria applicable to personnel used by the agency, as well as to personnel used by parents, a public agency would need to provide a parent the opportunity to demonstrate that unique circumstances justify selection of an evaluator whose fees fall outside the agency's cost containment criteria" (Independent Educational Evaluation, 71 Fed. Reg. 46689-90 [Aug. 14, 2006]).

lack of cooperation (IHO Decision at pp. 6-7). Upon review, I agree with the findings by the impartial hearing officer that the parent did not cooperate with the district based upon her failure to complete the BOCES information packet, failure to respond in a timely manner to the district's first two letters seeking her cooperation,¹⁵ and thereafter withdrawing her consent for the assistive technology evaluation and instructing the student not to participate in the evaluation (see IHO Decision at pp. 6-7; see also Tr. pp. 66-77; Dist. Exs. 21; 26; 27; 28; 30; 37; 40).¹⁶ Moreover, the hearing record does not support a finding that the assistive technology evaluation was required in order to provide the student with a FAPE. While the hearing record shows that the parties had agreed that the district would conduct the evaluation pursuant to the April 2010 settlement agreement (Dist. Ex. 1), as noted previously, the regulations do not confer jurisdiction to enforce settlement agreements at an impartial hearing or on appeal to a State Review Officer and the parent's claims that the district failed to implement the parties' settlement agreement will not be reviewed in this forum (8 NYCRR 200.5[j][2][iv]).

Conclusion

Based on the foregoing, I find that the July 2010 IEP offered the student a FAPE and that the impartial hearing officer correctly determined that the parent was not entitled to an IEE.

I have considered the parties' remaining contentions and find it is unnecessary to address them in light of my determinations herein.

THE APPEAL IS DISMISSED.

Dated: Albany, New York
October 12, 2011



JUSTYN P. BATES
STATE REVIEW OFFICER

¹⁵ In a letter dated September 13, 2010, the district's director of special education initially sent the BOCES questionnaire to the parents (Dist. Ex. 21). Two additional letters were sent to the parents by the director of special education on September 29, 2010 and October 8, 2010 (Dist. Exs. 26; 27). In a letter dated October 19, 2010 to the director of special education, the student's mother raised, among other things, objections to the questionnaire (Dist. Ex. 28). In a letter dated October 25, 2010 to the parent, the director of special education responded to the parent's letter (Dist. Ex. 30).

¹⁶ On December 8, 2010, evaluators from BOCES came to the district's school to conduct the assistive technology evaluation with the student, but the student advised the evaluators that his mother had told him not to participate (Dist. Exs. 37; 39; 40).